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In the
Supreme Court of the United States

MARION DOUGLAS WOOD
PETITIONER

VERSUS

UNITED STATES OF AMERICA
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JULIAN R. MURRAY, JR.
Counsel of Record
CHEHARDY, SHERMAN, ELLIS,
BRESLYN & MURRAY
One Galleria Boulevard, Suite 1100
Metairie, Louisiana 70001
(504) 833-5600

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in its determination that Petitioner Marion Douglas Wood was not denied his constitutionally protected right to a speedy trial even though he was not brought to trial until four years after he was indicted and despite his demands that he be afforded a speedy trial?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Marion Douglas Wood, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on February 7, 2001.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit, dated February 7, 2001, is reprinted in the appendix along with the judgment denying rehearing dated March 6, 2001.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered a judgment in this matter on February 7, 2001; and on March 6, 2001, it denied the petitioner's petition for rehearing. Thus, the jurisdiction of this court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Speedy Trial Clause of Sixth Amendment to the United States Constitution, which provides as follows: *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,* by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. *U.S. Const. amend. VI.*

STATEMENT OF THE CASE

A. Statement of Proceedings Below

On December 9, 1994, petitioner Marion Douglas Wood was indicted along with eight co-defendants in the Eastern District of Louisiana for alleged violations of 18 U.S.C. §§ 1341, 1343, and 1956. The Government had the indictment sealed, and it was not unsealed until January 17, 1996, The Government alleged that Mr. Wood had committed conspiracy to commit mail fraud, wire fraud, and money laundering in his role as President of Midwest Life and Public Investors Life. Mr. Wood entered a plea of not guilty at his arraignment on all counts. A jury trial was scheduled for March 18, 1996.

On February 21, 1996, the trial court ordered that the original trial date be continued. Upon learning that the trial was being postponed, via telephone from the Government counsel's secretary, Mr. Wood responded by faxing a letter to the court requesting a speedy trial, citing personal and health problems as well as his responsibilities to the public as an Arkansas legislator. On March 4, without a hearing, the trial court rescheduled the trial for January 13, 1997. Mr. Wood filed an Objection to the Continuance, again expressing his strong opposition to such an unreasonable delay and the lack of a hearing on the matter.

Thereafter, Mr. Wood filed a motion to dismiss the indictment alleging *inter alia,* a violation of his right to a speedy trial. The district court denied that motion.

Gary Jackson, one of Mr. Wood's co-defendants, filed a motion to continue the trial scheduled for January 13, 1997 due to health problems and the necessity of surgery. Over the objections of Mr. Wood, and his request to be severed from the other defendants, the trial was continued a second time to June 16, 1997.

Anticipating further continuances due to Mr. Jackson's ongoing health problems (and this did prove to be the case), Mr. Wood filed a Motion to Sever in April of 1997, once again asserting violation of his right to a speedy trial. The district court summarily denied this motion without addressing any of Mr. Wood's arguments. Less than a month after Mr. Wood filed his Motion to Sever, Mr. Jackson filed a motion for a third continuance, which was granted, and the trial was continued to November 3, 1997.

Further medical complications prompted defendant Gary Jackson to request yet another continuance. The district court ordered a fourth continuance and rescheduled the trial for May 4, 1998, addressing Mr. Wood's repeated requests for severance by stating that there was no basis for a severance due to the complexity of the case.

After another continuance (the fifth), Mr. Wood, along with his co-defendant James Adams, finally had his case tried before a jury beginning January 13, 1999, over four years after Mr. Wood's indictment and nine years after

the acts which he was alleged to have committed. After twenty-two days of trial, the jury retired to deliberate and returned with a partial verdict against Mr. Adams on one count and was deadlocked as to Mr. Wood. The judge read an Allen charge and sent the jury back to deliberate. A day and a half later, the jury remained deadlocked, and a mistrial was declared as to Mr. Wood. Mr. Adams was convicted of the one conspiracy count.

Before the second trial for Mr. Wood and Mr. Adams began, Mr. Adams entered into an plea agreement with the Government. Therefore, Mr. Wood was the only defendant in the second trial. The jury in the second trial began its deliberations after eight days of trial. After one and a half days of deliberating, the jury informed the court that it too was deadlocked. After an Allen charge from the judge, the jury returned that very same day with a verdict of guilty on all counts.

Mr. Wood filed a motion to downwardly depart from the Sentencing Guidelines, pointing out, *inter alia,* that the guideline range grossly overstated his participation in the overall scheme. The court denied that motion and sentenced Mr. Wood to fourteen years and five years, to run concurrently. His co-defendant, Mr. Adams, was only sentenced to fifty months, to run concurrently.

Mr. Wood timely appealed. The United States Court of Appeals for the Fifth Circuit affirmed Mr. Wood's conviction on February 7, 2001. In its review of Mr. Wood's case, the appellate court gave scant attention to the question of the defendant's right to a speedy trial. Never did it under-

take an analysis of how the four *Barker v. Wingo* factors "coalesced." Rather, it took each one of the *Barker* factors, isolated them, and, other than acknowledging that the four years satisfied the first threshold issue, the appellate court handled the other factors by simply quoting principles from cases that were completely inapposite. In all the cases cited by the appellate court, the defendant was either responsible for the delays, inasmuch as he had moved for continuances on a number of occasions, and/or the delays ranged from a few months to slightly over a year. Not one case cited by the appellate court even closely resembled the instant case where all four *Barker* factors coalesced. Further, the appellate court, in analyzing the "reason for the delay," just relied on the bromide in the *Doggett* case that "pretrial delay is often both inevitable and wholly justifiable."

The Fifth Circuit Court of Appeals denied Mr. Wood's petition for rehearing on March 6, 2001. Now, this application for writ of certiorari is respectfully submitted.

B. *Statement of Facts*

In 1989, Marion Douglas Wood was an attorney with a small law practice in Sherwood, Arkansas, and had been a State Representative in the Arkansas State Legislature for fourteen years. He was approached by Mr. Gary Jackson, who had an interest in Southshore Holding Corporation, which had just purchased Riverside Group, a company comprised of several insurance companies, including Midwest Life, Public Investors Life Insurance Company, and Fidelity Fire Insurance Company. Mr. Jackson explained that he and his partner, Bob Shamburger, were devising a

rehabilitation plan for the companies and needed someone to manage the day to day operations of Midwest Life and Public Investors Life Insurance Company. Wood was the candidate of choice for them as he had experience in such matters.[1] Believing he could handle the responsibility, Mr. Wood agreed to a $36,000 salary for a probationary period of sixty days, and $60,000 after the close of that period.

Mr. Wood began his role as President of Midwest Life Insurance Company and Public Investors Life Insurance Company (hereinafter Midwest and PILICO) in April of 1990. Although his duties were diverse and several, he most often found himself flying to numerous cities and states representing Midwest and PILICO.[2] Because Mr. Wood was a pilot and owned his own plane, he often flew himself between Arkansas, Louisiana (Metairie, Alexandria, and New Orleans), Texas (Dallas), and even New York. Mr. Wood's records of his company travels revealed that he had made more than 100 trips between April, 1990, and February, 1991.

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[1] In the 1980's, Mr. Wood had served as local counsel to Arkansas Insurance Commissioner on the rehabilitation of six insurance companies owned by the Baldwin United Chain. Up to that time, it was the largest rehabilitation of any insurance company in the history of the country.

[2] Additionally, while fulfilling his duties with Midwest and PILICO, Mr. Wood retained his position as state representative and continued to perform his legislative duties.

The Government's case against Mr. Wood was entirely circumstantial. It was able to prove without contradiction that Mr. Wood's co-defendants had been actively siphoning off millions of dollars out of these already financially unstable companies. However, the Government never presented any evidence, in either trial, that Mr. Wood had any knowledge or participation in the alleged schemes. The Government introduced documents and reports signed by Mr. Wood which were shown to contain misleading and false information. These documents were created by Mr. Jerry Palmer and Mr. Dennis LaFont, the company's attorney and accountant, who were both called as Government witnesses. They conceded they never told Mr. Wood about the fraudulent scheme in which they were involved. In fact, not one of the co-defendants (all of whom were cooperating pursuant to plea agreements) ever testified that they had ever informed or discussed with Mr. Wood any of the schemes or misrepresentations. They simply testified that he should have figured it out from the various documents he was given. But, Mr. Wood relied on the expertise of Mr. Palmer and Mr. LaFont for the accuracy of the documents. The likelihood of Mr. Wood knowing the falsity of the documents would depend upon the circumstances surrounding his involvement. His ability to recall and explain his position was substantially impaired by the fact that he was testifying nine years after the facts.

The evidence did show an apparent effort by Shamburger and Jackson to silence the employees who would have reason to know about the schemes by giving them large, six-figure "bonuses." Yet, it was acknowledged that Mr. Wood received no such bonus, only his agreed-

upon salary. This lack of evidence is underscored by the fact that when the Government introduced the bank records to show the money being diverted out of the companies, it even stipulated that Mr. Wood did not have any involvement with any of those transactions.

Mr. Wood's explanation was very plausible. He was constantly on the move between company offices. Shamburger, Jackson, Palmer, and LaFont had very respectable credentials, so there was no reason to doubt them or to suspect any wrongdoing. He testified that he had no reason to become suspicious until right before Christmas of 1990 when officials from the Texas Department of Insurance insisted on examining the mortgages regarding of pieces of property listed in Midwest's portfolio. Shamburger was resistant to showing them the mortgages, but when Mr. Wood explained to him that it was necessary, he relented and stated that he would have Mr. Palmer produce them at a meeting in Alexandria. When Mr. Palmer failed to appear at the meeting, Mr. Wood began to suspect something was wrong. He was discharged by Shamburger shortly thereafter. The federal investigation began within a few months.

While everyone involved in Southshore claimed Fifth Amendment privilege, Mr. Wood cooperated fully in the investigation and even supplied otherwise unavailable information to the Government. However, this cooperation ultimately hurt him. Although he consistently denied having any knowledge of the falsity of the documents he signed or of the fraudulent schemes, the Government prosecutor was able to confuse and confront him with inconsistent statements he had made during depositions and grand jury

hearings. Mr. Wood's memory had faded as to many of the innumerable facts and details of his position with Midwest and PILICO. This was compounded by the fact that most of the documents that Mr. Wood turned over to the Government were originals, of which he had no copies for himself with which to refresh his memory. Fearing the problems that eventually did result from the passage of nine years since he had anything to do with Midwest or PILICO, Mr. Wood repeatedly made known to the court his desire to have his case expedited and made objections to the unreasonable amount of time that had elapsed since his indictment.

Additionally, this expanse of over four years between his indictment and trial resulted in another prejudicial problem for Mr. Wood. His key fact witness, Mr. Jerry Willis, died in September, 1997, fifteen months before he was actually tried, and three months after the third continuance of his trial. Mr. Willis was a paid consultant to the companies from 1989 until 1991 and was a retired chief examiner for the Louisiana Insurance Department. Mr. Wood proffered during the second trial that Mr. Willis would have testified that he obtained all necessary approval from the Louisiana Insurance Department for transactions undertaken by Midwest Life and other companies during 1990 and 1991 and that they complied in all respects with Louisiana insurance laws.

REASONS FOR GRANTING WRIT

The United States Court of Appeals for the Fifth Circuit erred in failing to find that

Petitioner Marion Douglas Wood was denied his constitutionally protected right to a speedy trial even though he was not brought to trial until four years after he was indicted, and despite his demands that he be afforded a speedy trial.

A. *Introduction*

The petitioner recognizes that this Court's limited resources are of necessity devoted to broad constitutional issues, and it does not have the luxury of analyzing individual cases to determine whether or not the defendant was in fact guilty. For that reason, petitioner's factual analysis that touched on that very issue is perhaps more extensive than would ordinarily be expected. However, petitioner respectfully suggests that on occasion it is appropriate to pause and reflect that the Bill of Rights, in the final analysis, is designed to protect the innocent. The right to a speedy trial is not simply an abstract principle embodied in the Sixth Amendment. The instant case presents a concrete living example of why its inclusion, and its protection was, and is, important.

This Court has never had before it a case in which all four of the *Barker* factors did in fact coalesce.[3] In this case,

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[3] For example, in *Barker,* the Court determined that the prejudice suffered was minimal and pointed out that Barker himself did not want a speedy trial. *Barker v. Wingo,* 407 U.S. 514, 534, 92 S.Ct. 21825 2194 (1972). While in *Doggett,* the petitioner there came "up short" in his demonstration of prejudice. *Doggett v. United States,* 505 U.S. 647, 655, 112 S.Ct. 2686, 2692 (1992).

the Court is presented with a defendant who was not only asking for a speedy trial, but was begging for it. He was in fact prejudiced because he did not receive it. His inability to recall crucial events was the single most important factor leading to his conviction. 'The Court is therefore presented with the need to examine the "reason for the delay" factor. This is perhaps the most nebulous of all.

The Court held in *Barker* that it would not be a permissible reason to delay so that the prosecution could get a "tactical advantage," or to "hamper the defense," but those concepts have never been examined by the Court. In the instant case, the Government was not purposefully delaying so as to disadvantage petitioner. Rather, the Government and the district court saw the case as being complex, and it was therefore to the advantage and the convenience of both that all of the defendants be tried jointly. Can those factors override a defendant's Sixth Amendment right to a speedy trial in the face of a four year delay (two and one-half years from the time that co-defendant became too ill to be tried) and the defendant specifically demanding to be severed and tried separately? The fact situation is an ideal context in which to examine the issue. Finally, if the *Barker v. Wingo* factors have to be examined in the context in which they coalesce with each other, then the Fifth Circuit's "divide and conquer" approach should be analyzed and rejected.

B. *Argument*

The "right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer v. North Carolina,* 386 U.S. 213, 223, 87 S.Ct. 988,

1993(1967). According to this Court, the Sixth Amendment right to a speedy trial protects the vital interests of preventing undue and oppressive incarceration prior to trial, minimizing anxiety and concern accompanying public accusation, and limiting the possibility that long delay will impair the ability of an accused to defend himself. *Smith v. Hooey,* 393 U.S. 374, 378, 89 S.Ct. 575, 577 (1969). Throughout the course of the district court proceedings, Mr. Wood made pleas to the court to afford him his right to a speedy trial. However, he suffered the hardship of anxiety and concern for four long years before he was brought to trial; but even more damaging, petitioner's ability to defend himself was irreparably harmed.

This Court has before dealt with the issue of an individual's right to a speedy trial, albeit not recently. The controlling law is found in the case of *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2686 (1972). *See also, Doggett v. United States,* 505 U.S. 647, 112 S.Ct. 2686 (1992). The *Barker* Court determined that the proper way to evaluate whether a defendant's Sixth Amendment right to a speedy trial has been violated is to balance four factors: the "length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker,* 407 U.S. at 530, 92 S.Ct. at 2192. A balancing of these factors indicates that petitioner was deprived of this important right. These factors will be examined in turn.

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.*, 92 S.Ct. at

2192. There is no set time period that this Court has determined fulfills the delay. However, in *Doggett,* the Court acknowledged that lower courts generally find "postaccusation delay 'presumptively prejudicial' at least as it approaches one year. "[4] *Doggett,* 505 U.S. at 652 n. 1, 112 S. Ct. at 2691 n.1.

The delay in the instant case between the returning of the indictment and the trial was over four years, so it is clear that the first factor is satisfied.[5] That is particularly true when it is recalled that the government took over four years from the time it started the grand jury investigation until it returned the indictment.

As to the reason for the delay, this Court has provided some guidance.[6] However, in the instant case, the Court should revisit the issue to provide lower courts with a more specific framework by which they can better determine what type of delay by the government is legitimate.

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[4] The *Doggett* Court analyzed the time parameters and quoted with approval Joseph, *Speedy Trial Rights and Application,* 48 Ford.L.Rev. 611 (1980) that noted a general consensus that a delay is presumptively prejudicial if longer than eight months, and that there is general agreement that a delay of less than five months is not presumptively prejudicial.

[5] The Fifth Circuit Court of Appeals acknowledged that the delay here was sufficient to trigger speedy trial analysis.

[6] This Court last dealt with this issue of reason for delay in the *Doggett* decision.

The current governing language is as follows:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531, 92 S.Ct. at 2192.

In the present case, the reasons for delay were myriad but none attributable to the petitioner.[7] There were five separate continuances of the scheduled trial dates before Mr. Wood was finally afforded his day in court.

The original trial date was set for March 18, 1996, but two of the defendants moved for a continuance claiming they needed more time to prepare. Without Mr. Wood even being consulted, the court granted the continuance citing the exception to the Speedy Trial Act under 18 U.S.C. §3161, "... finding that the ends of justice served by the granting of

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[7] Concerning the reason for delay, the Fifth Circuit panel simply explained that because the delays were not the result of any bad faith or negligence, but instead were due to the requests for continuances made by petitioner's co-defendants, that factor weighed in favor of the state. Unfortunately, the appellate court did not seem to acknowledge that the Government opposed any motion of the defendant to be tried separately because it wanted the tactical advantage of trying all defendants together.

such continuance outweigh the best interest of the public and the defendant in a speedy trial." However the court did not give any reason for its finding.

The trial was reset for January 13, 1997, but that trial date was continued, over Petitioner Wood's objection, because the co-defendant Jackson was ill. The trial was then reset for June 16, 1997, and the court acknowledged even then that, "...this is an uncommonly long delay between the unsealing of the indictment and the trial...." However, this was just the beginning.

The case was reset for June 16, 1997; and again because of the illness of the co-defendant, and over the objection of Mr. Wood and his request to be severed, the case was continued to November 3, 1997. Once again it was not to be. Because of the same illness of the same co-defendant, the court continued the case finding that there was "...no basis for a severance in this case...." Mr. Wood's request for a speedy trial was not even discussed in the court's ruling. The court ordered the case continued until May 4, 1998. Predictably, the co-defendant Jackson was still ill, and accordingly the case was once again continued, this time without date. On May 14, 1998, the court held an evidentiary hearing to determine the ability of the co- defendant Jackson to go to trial and found at the time that he remained too ill and continued the trial until January 19, 1999.

The first trial did, in fact, finally take place in January and February of 1999, and as previously noted ended in a mistrial because of a deadlocked jury. While the

conviction being challenged stems from the second trial, for purposes of the Sixth Amendment, the delay ended when the defendant was at last afforded a trial in January of 1999.

Looking to this litany of continuance after continuance prompts the question of why the petitioner was not severed from his co-defendant so that be could be given his trial in a reasonable time. It is here that the Court needs to provide guidance. In *Barker,* it was explained that if the government was acting in bad faith or was in some way trying to hamper the defense, then this factor would weigh against the government. *Barker,* 407 U.S. at 531, 92 S.Ct. at 2192. But what is a court to do in a situation such as the one that is presented here?

Here, there is no showing of bad faith on the part of the government, nor is there a showing of negligence. The government opposed petitioner's motions for severance and his pleas for a speedy trial because it was better, more convenient, and advantageous for the government to try all of the defendants together. The *Barker* Court reminded that "it is improper for the prosecution intentionally to delay 'to gain some tactical advantage over (defendants)....' " *Id.* at 531 n.32, 92 S.Ct. at 2192 n.32. Does this include situations like the one here where the government would have a stronger case by trying the two defendants together, even though one was asking for numerous continuances and the other was pleading for a speedy trial? Here, there was not any bad faith by the government in the sense that it actively desired to hamper the defense. However, there was a concerted effort to oppose any attempt by petitioner to sever, which led to a complete and knowing disregard for

petitioner's right to a speedy trial.

Additionally, the duty of the trial court in this situation should be addressed as well. The responsibility for assuring that a defendant is afforded a speedy trial first lies with that court. Not once did the district court ever specifically address, much less analyze, the defendant's repeated requests for a speedy trial. The closest it came was to deny petitioner's request for a severance so that he could get a speedy trial, on the ground that the case was too "complicated" to sever. It is unfortunate to see such denigration of the Sixth Amendment by the lower courts.

This Court needs to examine these types of reasons for delay in bringing a defendant to trial. Can such unjustified reasons really be recognized as legitimate while a defendant is begging for a speedy trial? If such reasons are permitted to defeat an individual's right to a speedy trial, then they eviscerate that right as provided by the Sixth Amendment, and make a mockery of this Court's pronouncement of the right as being fundamental. The petitioner argues that such reasons should not be allowed.

As to the third *Barker* factor–the defendant's assertion of his right–Petitioner Wood not only requested a speedy trial, he begged for it. From the very beginning of the prosecution before the first continuance was granted, petitioner wrote to the court and stated as follows:

> I am writing to ask that the date of my trial be scheduled on an expedited basis for several reasons.

> First, and most importantly, shortly after I received by indictment and was waiting for my arraignment date, I developed a bleeding ulcer which required emergency hospitalization. It was mostly attributed to the significant stress I am now under. I don't think I can emotionally tolerate any extended period of not having the situation resolved without suffering substantial health problems.
>
> Second, as Chairman of the House Public Transportation Committee my presence will be needed later on this Summer and Fall in conducting hearings on important highway issues in preparation for the next legislative session.
>
> Lastly, whatever is left of my political career has a dark cloud over it as long as this case drags on. Ironically, I was considering running for the United States Congress on the date the indictments were handed down. Not much chance of that happening now, but I still have the remainder of my current term to office to serve the people and it's not fair to them to have this matter unresolved for an extended time. For these reasons, I would ask that the Court not delay this trial beyond the period required under the Speedy Trial Act.

As the *Barker* decision points out, a defendant who fails to demand a speedy trial has not forever waived his right. *Barker,* 407 U.S. at 528, 92 S.Ct. at 2191. The Court instead explained that a "defendant's assertion of ... his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." *Id.*, 92 S.Ct. at 2191. From his repeated objections and pleas, it can be said

that petitioner vigorously asserted his right.[8]

Finally, the fourth factor to examine is the prejudice to the defendant. Regarding this element, this Court in *Barker* stated as follows:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This court has identified three such interests: (i) to prevent oppressive pre-trial incarcerations; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility the defense would be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately the events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Id. at 532, 92 S.Ct. at 2193.

While the petitioner was not incarcerated while awaiting trial, the Supreme Court also commented on that factor. "Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Id.* at 532-33, 92 S.Ct. at 2193.

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[8] The Fifth Circuit Court of Appeals acknowledged that Mr. Wood did assert his right to a speedy trial.

Furthermore, regarding prejudice, Justice Brennan observed:

> But concrete evidence of prejudice is often not at hand. Even if it is possible to show that witnesses and documents, once present, are now unavailable, proving their materiality is more difficult. And it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses. As we stated in Ross v. *United States*... "[The defendant's] failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter .... In a very real sense, the extent to which he was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice.

Dickey v. Florida, 398 U.S. 30, 53-54, 90 S.Ct. 1564, 1576-77 (1970)(Citations omitted).

When petitioner first wrote to the court imploring a speedy trial, he expressed some of the anxieties which he was experiencing. He was denied a speedy trial, lost his health, lost his position in the legislature, lost his law practice, and suffered opprobrium which the public affords to one facing criminal charges.

On a more concrete level, because of the inordinate delays, petitioner lost the important testimony of the witness Jerry Willis. It will be recalled that he was a former chief

examiner of the Louisiana Insurance Department and was working for the Midwest Life Insurance Company as a paid consultant and liaison between Midwest and the Louisiana Insurance Department. He died unexpectedly on September 10, 1997. Had defendant Wood been granted the speedy trial which he requested, he would have had the benefit of Mr. Willis' testimony.

That testimony was clearly material to petitioner's case.[9] As the liaison between Midwest and the Louisiana Insurance Department, he knew what information was desired and what information and explanations were being presented. He also would have known the sources within Midwest who were providing the information. It will be recalled that Mr. Wood maintained that while he signed certain documents containing information which was later disclosed as being inaccurate, he based his representations on information being supplied by Mr. Palmer and Mr. LaFont. Mr. Willis would have been in a position to verify that very important contention.

Probably the most telling victim of delay was memory. The *Barker* Court recognized the impact of dimming memories on the defendant's case. Unfortunately, the

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[9] Despite petitioner's demonstration of the materiality of Mr. Willis' testimony, the appellate court rejected the clear showing of prejudice on the ground that petitioner did not interview him before his death. There was simply no reason to interview him. Petitioner knew what testimony Mr. Willis could give. Additionally, Mr. Willis was not ill for an extended period of time; he died suddenly of a heart attack.

passage of time had a dire effect on Mr. Wood's memory. The Government's case in chief against Mr. Wood was extremely weak with no direct evidence. However, the prosecution was able to strengthen its case tremendously in its blistering cross examination of him. He was confronted with transactions and conversations that had allegedly taken place nine years earlier; and they were juxtaposed against grand jury and civil deposition testimony.[10] The prosecutor confronted Mr. Wood with one inconsistency after another–to the point where he admitted complete confusion and an inability to respond–and used those contradictions to later argue to the jury that it was obvious that the defendant was lying, and hence he must be guilty. However, the nine year delay in bringing the defendant to trial obviously had something to do with his inability to remember.[11]

Miscreants are acutely conscious of what they are doing and the fact that they may have to one day explain their actions. Conversely, the innocent go about their day to day business paying no particular attention to their actions having no reason to believe that they later may be called upon to defend themselves. Consequently, the malefactor is

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[10] As previously noted, Mr. Wood was the only defendant out of all those accused who never once invoked the Fifth Amendment. He cooperated fully in every civil, criminal, and grand jury investigation.

[11] The appellate court cynically noted that Mr. Wood did not seem to suffer a memory lapse on direct examination, thus there was no showing of prejudice. However, as is always the case, the inaccuracies, and errors, and inconsistencies of direct examination are never evident until they are brought out on cross examination.

well prepared to explain every transaction–even nine years later–whereas the guiltless will likely not remember and be confused.

CONCLUSION

For the foregoing reasons, Petitioner Marion Douglas Wood respectfully submits that the writ of certiorari should be granted by this Honorable Court.

Respectfully submitted,

JULIAN R. MURRAY, JR.
COUNSEL OF RECORD
CHEHARDY, SHERMAN, ELLIS
BRESLIN, & MURRAY
One Galleria Boulevard, Suite 1100
Metairie, Louisiana 70001
(504) 833-5600

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-31261

Filed FEB 7, 2001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARION DOUGLAS WOOD,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans
USDC No. 94-CR-377-3-B

Before JOLLY and DAVIS, Circuit Judges, and RESTANI, Judge.*

PER CURIAM:**

*Judge, U.S. Court of International Trade, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Marion Douglas Wood was convicted of conspiracy to commit mail fraud, wire fraud, and money laundering in his role as President of Midwest Life and Public Investors Life from April 1990 to February 1991. On appeal, Wood challenges his conviction, claiming: (1) that the indictment was duplicitous, because it charged more than one conspiracy, and that it prejudiced him because the evidence, at most, only connected him with one conspiracy; (2) that the delay between the indictment and the trial violated his Sixth Amendment right to a speedy trial; (3) that the district court erred in refusing to strike some of the language in the indictment as prejudicial surplusage; (4) that the district court erred in failing to instruct on materiality; (5) that the district court's instruction pursuant to Allen v. United States, 164 U.S. 492 (1896), modified to meet the current situation, coerced the jury into reaching a verdict; and (6) that the district court erred in applying the sentencing guidelines and in refusing to depart downward. Because we find no reversible error, we affirm Wood's conviction.

I

In December 1989, Southshore Holding Corporation, owned by Bob Shamburger and Gary Jackson, purchased Riverside Holding Company, which owned The Midwest Life Insurance Company ("Midwest"), Fidelity Fire and Casualty Insurance Company ("Fidelity Fire"), Public Investors Life Insurance Company ("PILICO") , and a number of other companies.. Shortly thereafter, Jackson and Shamburger hired wood, a practicing attorney and state legislator in Arkansas, to be president of Midwest and PILICO.

Wood was responsible for filing financial statements for the companies, and for encouraging investor capital. During Wood's tenure as president of Midwest and PILICO, however, over $40 million in assets were transferred to Jackson and Shamburger, hardly a capital investment. Although Wood contends that he did not examine them, Wood signed a variety of documents, including some that inaccurately reported the value of assets, and others that were backdated to fall into earlier financial quarters. Notwithstanding this good service for those in charge, Wood was discharged by Shamburger in February of 1991.

In December of 1994, Wood was charged along with six other defendants with conspiracy to commit mail fraud, wire fraud, and money laundering, as well as substantive violations of mail fraud in violation of 18 U.S.C. §§ 1341, 1343. The government had the indictment sealed; it was not unsealed until January 1996.

Other facts relate to the speedy trial claim: on February 27, 1996, the court granted the motion of Wood's co-defendant, James L. Adams, to continue the trial date due to the complexity of the case. On March 4, 1996, the court reset the trial for January 1997. At this point, Wood requested that the court not delay the trial, and, two weeks later, filed an objection to the continuance. On April 2, 1997, Wood moved to dismiss the indictment alleging that the court had violated the Speedy Trial Act by improperly entering its continuance order. The district court denied this motion on December 27, 1996. In 1997 and 1998, Wood's co- defendant, Jackson, f iled five separate continuances for medical reasons. Wood objected to some of these contin-

uances, and requested severance from the other defendants, which the court denied.

The case was first tried beginning on January 13, 1999. The Jury was unable to break a deadlock, and a mistrial was declared as to Wood on March 5, 1999. Wood was tried again, by himself, on August 2, 1999. The jury deliberated for one and a half days before informing the court that it was deadlocked. After an Allen charge, the jury returned verdicts of guilty on all counts.

Wood filed objections to the pre-sentencing report, which were overruled, and a motion for downward departure from the guidelines, which was denied. Wood was sentenced to fourteen years and five years, to run concurrently, and $1.4 million in restitution.

II

Wood first argues that the district court erred in denying the defendant's motion to dismiss the conspiracy charge as duplicitous. Wood contends that although the indictment supposedly charged only one conspiracy, the government, in fact, charged at least two conspiracies. He argues that he was prejudiced by the introduction of evidence related to a conspiracy in which he had no involvement. Wood also claims that, to the extent that the government claims only one conspiracy, there is no evidence that he was a part of the conspiracy and thus the case against him should have been dismissed.

We review a claim that an indictment is duplicitous

de novo. United States v. Sharpe, 193 F.3d 852, 866 (5th Cir. 1999). The indictment should be assessed to determine whether each count can be read to charge only one violation. Id. As long as there is an agreement among the defendants on an overall objective, the indictment can be read to charge one conspiracy. Id. Here, the indictment charged that the objectives of the conspiracy were to defraud Midwest and Fidelity Fire, and to conceal this fraud through the distribution of false financial information.[1] This count can be read to charge only one conspiracy. See United States v. Mann, 161 F.3d 840, 858 (5th Cir. 1999) (recognizing that acts of concealment are sometimes a necessary part of the overall conspiracy). Furthermore, the district court did not err in failing to dismiss the conspiracy charge against Wood for variance between the conspiracy and the proof offered at trial. The government introduced evidence regarding several of Wood's transactions and misrepresentations that reasonably could support the jury's determination that Wood knew of and adopted the objective of defrauding Midwest

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[1] We agree that the government's draftsmanship asks for trouble. Specifically, the indictment charged that:

> [t]he main objective of the conspiracy was to defraud Midwest Life and Fidelity Fire of money and other assets, distribute false financial information about Midwest Life to conceal the fraudulent activities, to lure new investors and policyholders, and to deceive current investors and policyholders while distributing false financial information about Public Investors Life to conceal its poor financial condition.

Nevertheless, this charge breaks down into an overall objective of two main components: (1) to defraud Midwest and Fidelity Fire, and (2) to conceal these fraudulent activities.

and Fidelity Fire and concealing that fraud. For instance, the government introduced evidence that Wood, as president of Midwest, signed a backdated purchase and sale agreement selling the Parkway Plaza building to three shell corporations, even though, at the actual date of the agreement, he was hiring real estate agents to attempt to sell the building. The government also introduced evidence that Wood helped to create a bogus $5,000,000 promissory note, turning the loss on Midwest's financial statements into a gain, by signing a letter canceling an already executed agreement for a $6,000,000 loan, and substituting a backdated document claiming $11,000,000 in indebtedness for virtually the same collateral. Although Wood claims he only signed the documents, and was not aware of the contents of the documents, this evidence, and evidence of other transactions, could reasonably support the jury' s determination that Wood was involved in the conspiracy.

III

Wood next challenges the district court's failure to dismiss the indictment for lack of a Speedy Trial, as guaranteed by the Sixth Amendment.[2] Wood was indicted in December of 1994, indictment was unsealed in January of 1996, and his first trial took place in January of 1999. Thus, approximately four years elapsed between the date of his trial and the date of his initial sealed indictment, and approximately three years elapsed between the date of his trial and

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[2] On appeal, Wood does not challenge the delay under the Speedy Trial Act, nor does he challenge the district court's ruling that there was no due process violation in the pre-indictment delay of forty-five months.

the date of the unsealing of the indictment.[3]

The Supreme Court has provided a four-part balancing test to determine whether a defendant received a speedy trial under the Sixth Amendment. In evaluating Wood's claim, we must consider: (1) the length of the delay, (2) whether the defendant asserted his right to a speedy trial, (3) the reason for the delay, and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972) We view the length of delay as a threshold inquiry. A delay of one year is presumptively prejudicial, and, therefore, is sufficient to trigger speedy trial analysis. United States v. Lucien, 61 F.3d 366, 371 (5th Cir. 1995) Because Wood's case was delayed for three to four years, we turn to consider the other three factors. Wood's objections to the continuances centered primarily on his requests for severance from the other defendants. He did, however, assert his right to a speedy trial.

We must next take into account the reasons for the delay. Trial was delayed, first, because the indictment was sealed while the government searched for all of the defendants, and, second, because Wood's co-defendants moved for continuances for extra preparation time and illness. As the Supreme Court has noted, "pretrial delay is often both

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[3] Because we find that Wood's Sixth Amendment right to a speedy trial was not violated either by the delay between the date of the unsealing of the indictment and the date of trial or the date of the initial indictment and the date of the trial, we do not consider whether the Sixth Amendment right to a speedy trial attaches when the defendant is initially indicted or when the indictment is unsealed.

inevitable and wholly justifiable." Doggett v. United States, 505 U.S. 647, 656 (1992). Thus, "where the state advances valid reasons for the delay, or the delay is attributable to acts of the defendant, this factor is weighed in favor of the state." Cowart v. Hargett, 16 F.3d 642, 647 (5th Cir. 1994). Here, there is no indication that the government failed to search for Wood's co-defendants with diligence. Furthermore, the government objected to the continuances requested by Wood's co-defendants. Because the delays were not the result of the government's negligence or bad faith, but instead are attributable to Wood's co-defendants, this factor weighs in favor of the state.

Finally, we examine the degree of prejudice resulting from the delay. Because "the government was reasonably diligent in its efforts to bring the defendant to trial, the defendant must show 'specific prejudice to his defense.'" Robinson v. Whitley, 2 F.3d 562, 570 (5th Cir. 1993) (quoting Doggett, 505 U.S. at 654) . Potential harm resulting from a delay includes oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the defendant's defense will be impaired by "dimming memories and loss of exculpatory evidence." Doggett, 505 U.S. at 654. Here, there was no pretrial incarceration. Wood only complained about anxiety in his first speedy trial motion. Thus, Wood first argues that, because of the delay, he lost the important testimony of Jerry Willis. Wood has failed to demonstrate, however, that not having Willis's testimony impaired his defense. Wood has also not explained why neither he nor his attorney took steps to interview Willis or preserve his testimony. See United States v. Neal, 27 F.3d 1035, 1043 (5th Cir. 1994). Wood next argues that the delay

impaired his memory, which weakened his trial testimony. Specifically, he contends that the prosecutor confronted him with transactions and conversations that had allegedly taken place nine years earlier, and then juxtaposed that against his grand jury and civil deposition testimony. While Wood's confusion on the stand might be tangentially related to the three- or four-year time lapse between indictment and trial, Wood did not suffer memory lapses on direct examination. The possible relationship between his confusion at the hands of the prosecutor and the time delay does not support a finding of actual prejudice. Thus, in balancing all of these factors, we must conclude that Wood's right to a speedy trial under the Sixth Amendment was not violated.

IV

Wood also argues that the district court erred in not striking allegations in the indictment that Wood caused a number of acts to be done, such as causing individuals and entities to make campaign contributions to a corrupt Louisiana insurance commissioner to ensure less regulation and review of the insurance companies' management. In his motion to strike, Wood objected to seventeen uses of the word "cause" in the indictment, only one of which *is* described in detail in his appellate brief. Wood claims that the trial judge should have known that the allegations were prejudicial surplusage because they were unsupported by any evidence at the first trial.

We review a district court's decision to deny a motion to strike for abuse of discretion. United States v. Graves, 5 F.3d 1546, 1550 (5th Cir. 1993). To hold that this

refusal to strike should invalidate Wood's conviction, we must find that the "allegedly excessive language was irrelevant, inflammatory and prejudicial." United States v. Bullock, 451 F. 2d 884, 888 (1971) . Because we find that Wood failed to meet this exacting standard, the district court did not commit reversible error in denying the motion to strike.

V

Because Wood did not object at trial to either the district court's failure to instruct the jury as to the materiality element of mail fraud and wire fraud, or the district court's Allen charge to the jury to continue deliberating, this court reviews both of those determinations for plain error. Because we find that neither of these actions "seriously affect fairness, integrity or public reputation of judicial proceeding and result in miscarriage of justice," there is no plain error. United States v. Waldrip, 981 F.2d 799, 805 (5th Cir. 1993).

VI

Finally, Wood objects to the district court's application of the sentencing guidelines and its failure to downwardly depart. We review a district court's application of the sentencing guidelines de novo and its findings of fact under a clearly erroneous standard. United States v. Morrow, 177 F.3d 272, 300 (5th Cir. 1999). Wood argues that the district court should not have used money laundering as a basis for his sentence, because he was not even charged with money laundering. Under U.S. Sentencing Guidelines Manual

§ 1B1.2(d), using money laundering as the basis for sentencing on Wood's conspiracy violation was appropriate as long as "the court, were it sitting as trier of fact, could convict the defendant of conspiring to commit that object offense." U.S. Sentencing Guidelines Manual § 1B1.2(d), cmt. n.4. In overruling Wood's objection to the use of money laundering for the basis of Wood's sentence, the district court specifically noted that Wood signed off on the Grant Street transaction, in which Midwest purchased mortgages from Master Holding, 98, Inc., a company owned by Jackson and Shamburger. Midwest purchased the mortgages at their face-value from Master Holding, despite the fact that Wood had received correspondence that the mortgages were being offered at a steeply discounted rate. Because we find that the district court's determination that Wood conspired to launder money through the Grant Street transaction was not clearly erroneous, we uphold Wood's sentence.

Wood also appeals from the district court's refusal to depart downward from the sentencing guidelines, arguing that the disparity between his sentence and the sentence of his co-conspirator is unjustified. This court, however, can only review a district court's refusal to depart from the guidelines if its decision was based on the erroneous belief that it did not have the authority to depart. United States v. Davis, 226 F.3d 346, 359 (5th Cir. 2000). A review of the record convinces us that the district court was aware of its ability to depart downward but chose not to depart. Thus, the district court's decision not to depart is unreviewable.

VII

The district court did not err in failing to find the indictment duplicitous, in finding that there was no Sixth Amendment speedy trial violation, in refusing to strike certain terms from the indictment, and in not instructing the jury on materiality. We also hold that the Allen charge given to the jury was not plain error, and that the district court did not err in applying the sentencing guidelines. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed MAR 6, 2001

No. 99-31261

UNITED STATES OF AMERICA

Plaintiff - Appellee

V.

MARION DOUGLAS WOOD

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING

Before JOLLY and DAVIS, Circuit Judges, and RESTANI, Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is **DENIED.**

ENTERED FOR THE COURT:
/S/ Grady Jolly
United States Circuit Judge

*Judge, U.S. Court of International Trade, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 99-31261

UNITED STATES OF AMERICA
Plaintiff-Appellee

VERSUS

MARION DOUGLAS WOOD
Defendant-Appellant

PETITION FOR REHEARING

NOW INTO THIS HONORABLE COURT, through undersigned counsel, comes defendant-appellant, Marion Douglas Wood, who moves pursuant to Rule 40 of the Federal Rules of Appellate Procedure for rehearing on that portion of the Court's decision which held that he was not denied his right to a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution.

While the defense respectfully disagrees with the Court regarding its ruling on other points raised in the appeal it is only regarding the Sixth Amendment issue that rehearing is requested. Even as to that issue the defense will attempt to comply with Local Rule 40.2 and avoid mere "reargument of the issue previously presented." Rather, appellant will focus on specific portions of the Court's opinion where it is respectfully suggested that the Court misconstrued important factual and legal issues.

The Court's opinion went through the four factors that the United States Supreme Court requires be analyzed when there is a claim of Sixth Amendment deprivation of night to speedy trial. In *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct 2182 (1972) the Supreme Court mandated a balancing of the following factors: length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant. The Court's opinion acknowledged that four years from the time of indictment to the time of trial satisfied the "length of delay" factor under *Barker.* It also acknowledged that the defendant had asserted his right to a speedy trial, so apparently there was no issue there.[1] The apparent reason that this Court rejected the appellant's claim that he was denied his Sixth Amendment right to a speedy trial related to the "reason for the delay" and the "prejudice to the defendant". Regarding the reason for the delay the Court noted as follows:

> We must next take into account the reasons for the delay. Trial was delayed, first, because the indictment was sealed while the government searched for

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[1] The opinion does comment that the defendant did not specifically complain of stress and anxiety each time the trial was continued, but there is no requirement that that be done under *Barker*. A request for a speedy trial once filed does not expire with the passage of time. That is particularly true in situations such as in the present case where the defendant specifically requested that if the ill co-defendant did not recover so as to be timely tried, that he be granted a severance so that he could secure the speedy trial to which he was entitled. Having once explained to the court the reason he desired a speedy trial a defendant should not be required to repeat himself each time he complains about a continuance.

all of the defendants, and, second, because Wood's co-defendants moved for continuances for extra preparation time and illness.

The Court seemed to take the position that if the government was not responsible for the delay then it somehow *ipso facto* must be reasonable. The defense respectfully disagrees. The government was singularly indifferent and resistant to the Sixth Amendment right of any defendant(s) to be tried separate from any other defendants because it wanted the tactical advantage of trying all of the defendants together. Specifically the government continually objected to any effort to sever and try any defendant(s) separately from the chronically ill co-defendant Jackson. While it was, and remains, appellant's position that it was the Sixth Amendment right, as opposed to the Speedy Trial Act rights, that were violated, it is appropriate to note that even the Speedy Trial Act only allows for a "reasonable period of delay" when one of several co-defendants is unable to go to trial. To suggest that 2-1/2 years is reasonable makes a mockery of the Sixth Amendment and the Speedy Trial Act.

Further, while this Court examined whether the government was at fault in causing the delay, it failed to consider, and in fact completely ignored, the responsibility of the trial court. While it is to be expected that the government would respect a defendant's right to a speedy trial, the responsibility for assuring same is not with the executive branch, but with the judiciary. Not once did the district court ever specifically address, much less analyze, the defendant's repeated requests for a speedy trial. The closest it came was to deny Mr. Wood's request for a severance so that he could

get a speedy trial on the ground that the case was too "complicated" to sever. It is unfortunate to see such denigration of the Sixth Amendment by the district court, and its acceptance by this Court.

Regarding the issue of prejudice the Court's opinion states:

> Wood only complained about anxiety in his first speedy trial motion. Thus, Wood first argues that, because of the delay, he lost the important testimony of Jerry Willis. Wood has failed to demonstrate, however, that not having Willis's testimony impaired his defense. Wood has also not explained why neither he nor his attorney took steps to interview Willis or preserve his testimony. See *United States v. Neal,* 27 F.3d 1035, 1043 (5th Cir. 1994). Wood next argues that the delay impaired his memory, which weakened his trial testimony. Specifically, he contends that the prosecutor confronted him with transactions and conversations that had allegedly taken place nine years earlier, and then juxtaposed that against his grand jury and civil deposition testimony. While Wood's confusion on the stand might be tangentially related to the three- or four-year time lapses on direct examination.

First of all the Court's decision did not even address the fact that the Supreme Court in *Barker,* and this Court in *Hoskins v. Wainwright,* 485 F.2d 1186 (1973), ruled that "... there must be some point of coalescence of the other three factors in a movant's favor, at which prejudice - either actual or presumed - becomes totally irrelevant." *Hoskins v. Wainwright* at 1199-1192. Given the fact that the defendant

asked for a speedy trial, over four years elapsed before he was given a trial, and the only reason for the delay was that a co-defendant was ill, it would appear that those three factors have coalesced to such a point that showing of prejudice is not required. This Court ignored the ruling in *Barker* that "[i]f witnesses die or disappear during a delay, the prejudice is obvious." *Barker v. Wingo,* supra at 532, 2193. (Emphasis added.) In this case not only was the defense able to show that a witness had died, but further was able to demonstrate that the testimony of the dead witness was material. However, this Court rejected that clear showing of prejudice on the ground that the defendant did not interview the witness before his death. That, of course, is exactly the "Catch 22" that Justice Brennan predicted. "Even if it is possible to show that witnesses and documents, once present, are no longer unavailable, proving their materiality is more difficult." *Ibid.* at 1192.

The plain fact is that there was simply no reason to interview Mr. Willis. It is not as though the defendant did not know what evidence Willis would be able to give, or that he was ill and his testimony should have been taken for preservation. The defendant knew exactly what information that Mr. Willis would be able to give, and he died unexpectedly of a heart attack. Certainly had the defendant been given the speedy trial which he requested he would have interviewed Mr. Willis before calling him as a witness. However, there was no reason to have interviewed him prior to that.

This Court cites the case of *Robinson v. Whitley, 2* Fed.3rd 562 (5th Cir. 1993) for the proposition that the

defendant must show specific prejudice to his defense because the prosecution "...was reasonably diligent in its efforts to bring the defendant to trial..." quoting from *Doggett v. United States,* 505 U.S. 647, 112 S.Ct. 2686 (1992). However, the court in *Robinson* found that almost all of the four year delay in bringing him to trial was occasioned by the fact that he was a fugitive from justice, and he filed numerous motions for continuance. None of which is applicable in the instant case. To the contrary, the *Robinson* decision correctly quotes *Doggett* as standing for the proposition that if "...the government intentionally held back its prosecution in order to gain an impermissible tactical advantage then the defendant would 'present an overwhelming case for dismissal'". *Robinson* at 570, quoting from *Doggett* at 2693. Throughout the entire four year period the government had the ability to try Mr. Wood, but held back its prosecution so that it could get the tactical advantage of being able to try all of the defendants together.

For the same reason the case of *Cowart v. Hargett,* 16 F.3d 642 (5th Cir. 1994) is not applicable. That case was quoted by this Court for the proposition that "where the state advances valid reasons for the delay, or the delay is attributable to acts of the defendants, this factor is weighed in favor of the state." *Ibid.* 647. None of the delay here was attributable to the defendant, and the government's efforts to secure the tactical advantage of trying all of the defendants together is not a "valid" reason for the extraordinarily long delay in this case. In *Cowart* the delay between indictment and trial was only 92 days! Further, Cowart did not ever request a speedy trial.

Language gleaned from inapposite cases should not be a basis for denying appellant his right to a speedy trial. Likewise, the cases of *United States v. Neal,* 27 F.3d 1035 (5th Cir. 1994) is not applicable. That there was only a 16 month delay and much of it was occasioned by the defendant's "request for continuances". Here there was a four year delay, three from the date of unsealing, and the defendant never asked for a continuance. It is true that in the *Neal* case the court noted that the defendant did not explain why neither he nor his attorney took steps to preserve the witness' testimony for trial, but in that case the defendants never presented the court with any reason why the testimony of the "lost witnesses" could not have been enlisted from other witnesses. In the present case the testimony of Mr. Willis was so unique that it is obvious that only he could have presented it.

Finally, the defense finds it most disappointing that the Court bought into the prosecutor's cynical observation that Mr. Wood did not have any loss of memory on direct examination. A review of the transcript clearly reflects that he did. As is always the case, the inaccuracies, and errors, and inconsistences of direct examination are never evident until they are brought out on cross examination.

The point is that the Court seems to be saying that "you can't get there from here." No matter how many of the *Barker* factors the defense was able to establish they were individually discounted and deprecated, notwithstanding that the coalescent value of all four of them in the instant case was compelling. The defendant not only requested a speedy trial, he begged for one. When it was denied to him

because a co-defendant was ill, he requested to be severed. That was denied. When an important material witness died and was unavailable to the defendant at the time of trial that factor was discounted because the defendant did not interview him ahead of time. And the reason for all of the delay - it was more convenient to the government and the court to try all of the defendants at one time. The Sixth Amendment has to have more importance than that.

One final word. Because the Court chose to issue its decision regarding this most important constitutional issue as an unpublished opinion, it declares that it has no precedential value. That may be true insofar as the ability of litigants to quote from the decision in future cases, but it has practical precedential value in the real world. Judges and litigants, at least in the Eastern District of Louisiana, watch these cases with interest to see to what extent the appellate courts are willing or reluctant to enforce a defendant's constitutional rights. They are going to recognize that if a defendant cannot secure his Sixth Amendment right under the facts of this case it is unlikely that there will ever be a situation where the prosecution or the district courts will ever have to be concerned about any speedy trial issue.

For the foregoing reason defendant-appellant Marion Douglas Wood prays that he be granted rehearing, and that the Court rule that he was denied his right to a speedy trial, and that the charges against him be dismissed.

Respectfully submitted,

CHEHARDY, SHERMAN, ELLIS,
BRESLIN & MURRAY

/s/ Julian R. Murray, Jr.
JULIAN R. MURRAY, JR.
One Galleria Boulevard, Suite 1100
Metairie, Louisiana 70001
Telephone: (504) 833-5600
Bar No. 7526
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Rehearing has been forwarded to Assistant United States Attorney, Harry W. McSherry, Jr., 501 Magazine Street, New Orleans, Louisiana 70130, by placing same in the United States mail, first, class, postage pre-paid, and by hand delivery this the 21st of February, 2001.

/s/ Julian R. Murray, Jr.
JULIAN R. MURRAY, JR.